In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-977

HULAN E. JACK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-978

L. JOSEPH OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.[1] A7-A18) is not yet reported.

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[1] "Pet. App." throughout this brief refers to the appendices to the *Jack* petition in No. 72-977.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1972. The petitions for writs of certiorari were filed on January 11, 1973 (Pet. App. A6). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Jack:

1. Whether the trial court properly instructed the jury on the issue of willfulness.

Petitioner Overton:

2. Whether the trial court properly denied petitioner's request for a trial by the court.

3. Whether petitioner was placed in double jeopardy by the selection of an additional alternate juror.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners Overton and Jack were convicted of having violated provisions of the Taft-Hartley Act, 29 U.S.C. 186, and of having conspired to commit the substantive offenses, in violation of 18 U.S.C. 371. Petitioner Overton was sentenced to a one-year term of imprisonment, with execution of six months suspended, to be followed by a three year period of probation, and fined $10,000. Petitioner Jack was sentenced to one year imprisonment, with all but three months suspended, to be followed by three years' probation, and fined $5,000. The court of appeals affirmed (Pet. App. A6).

The evidence, the sufficiency of which is not in dispute, is set forth in detail in the opinion of the court below. Briefly, it showed that petitioners were part of a conspir-

acy which operated from January 1966 until late 1970. The purpose of the conspiracy was to exploit the influence which petitioner Overton, in his capacity as business agent for Harlem Local 338, AFL-CIO, exercised over retail grocers who employed members of that local. Petitioners, together with codefendants Rosenblum and Solomon, formed Coordinated Community Services, Inc. (CCS), a corporation which entered into contracts with various food manufacturers to promote their products in those grocery stores and supermarkets which employed or might employ members of Local 338. Retail merchants whose employees were represented by Local 338 were informed that they could expect labor difficulties if they were unwilling to purchase the products of CCS clients. By means ranging from mere solicitation to use of an illegal strike called by petitioner Overton himself, CCS was able to persuade the retailers to purchase from its clients; in return, CCS was paid substantial commissions by the manufacturers it represented.

ARGUMENT

1. Petitioner Jack contends that the trial court erred in refusing to charge the jury that the phrase "willfully violates" in 29 U.S.C. 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." We submit that the court properly instructed the jury that "[a] general intent to commit the act charged need only be proved * * *. * * * [I]gnorance of the law forbidding an alleged unlawful act * * * is no defense * * *" (Tr. 1340-1341).[2]

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[2] The complete charge on this issue was as follows:

> A general intent to commit the act charged need only be proved. The government must prove only that the defendant whose guilt or innocence you are considering knowingly did the

Although, as petitioner notes, certain *malum prohibitum* offenses require specific intent to evade a legal obligation, the misdemeanor statute involved here is not within that exception. *United States* v. *Lanni*, 466 F. 2d 1102, 1110 (C.A. 3); *United States* v. *Ricciardi*, 357 F. 2d 91, 100 (C.A. 2), certiorari denied, 384 U.S. 942; *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied *sub nom. Felice* v. *United States*, 373 U.S. 915; *Brennan* v. *United States*, 240 F. 2d 253 (C.A. 8), certiorari denied, 353 U.S. 931. Any contrary suggestion in the language of the decision of the Seventh Circuit in *United States* v. *Incisco*, 292 F. 2d 374, has been disapproved by the later holding of that court in *United States* v. *Keegan*, 331 F. 2d 257, 262, certiorari denied, 379 U.S. 828.[3]

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act which the law forbids, but it need not be shown that the defendant whose guilt or innocence you are then considering knew of or purposely intended to violate the law.

A defendant's intent to conspire as charged may be determined from all the facts and circumstances surrounding the case. However, ignorance of the law forbidding an alleged unlawful act, even if it be a fact, is no defense either to the charge of conspiracy here made, which is Count 1, or to the charge as contained in Counts 4 through 21.

An act or failure to act is only done within the meaning of the statute here if it is done voluntarily and intentionally and not because of mistake or accident.

[3] *United States* v. *Fischetti*, 450 F. 2d 34 (C.A. 5), certiorari denied, 405 U.S. 1016, upon which petitioner also relies, is not in conflict with the decision below. The court in *Fischetti* merely held that since willfulness is an element of the offense it must be alleged in the indictment. The court there expressed no view concerning the appropriate standard of willfulness. The Tenth Circuit, as petitioner points out, in *Korholz* v. *United States*, 269 F. 2d 897, certiorari denied, 361 U.S. 929, termed as "accurate" an instruction which required the jury to find either specific intent to violate Section 186 or reckless disregard for the law, but the court did so in the course of affirming a conviction under that more stringent test. Since the

2. Petitioner Overton claims that the district court committed reversible error in denying his request for a non-jury trial. He argues that the prosecution should not have been permitted, without an appropriate showing of good faith, to withdraw its earlier oral consent to a jury-waived trial.

At a pretrial conference for the purpose of fixing a date certain for trial on November 5, 1971, defendants indicated for the first time their willingness to proceed without a jury. The defendants gave no reason for wanting to forego jury trial other than to expedite matters. After the court indicated that government consent was required to effectuate the defense's waiver of a jury trial, the prosecutor stated that the government was prepared to accept a waiver. At this point, the court stated that the waiver would not go into effect until each defendant had been advised of his right to a jury trial and all the parties had submitted their consent in writing.

When the parties reconvened on the following day, the prosecution stated that it had reexamined its position and decided not to consent to defendants' waiver of jury trial. The defendants did not object, but urged the court to inquire into the reasons underlying the government's decision. The court declined, noting that neither the defendants nor the prosecution had yet executed the written consent necessary to an effective waiver. This ruling was proper.

It is well settled that a defendant has no absolute right to be tried by a judge alone. *Singer* v. *United States*,

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instruction approved there was favorable to the defendant, the court was not required to focus closely on the appropriate willfulness standard.

380 U.S. 24. Rule 23, Fed. R. Crim. P., unequivocally conditions a non-jury trial upon the consent of the prosecution and further states that a waiver must receive the full sanction of the trial court before it becomes effective. This is in accordance with this Court's decision in *Patton* v. *United States*, 281 U.S. 276, 312. Here, as noted by the district court, no written waiver had been executed and the government was not required to "articulate its reasons for demanding a jury trial." *Singer* v. *United States, supra*, 380 U.S. at 37. See, also, *United States* v. *Simon*, 425 F. 2d 796, 799 n. 1 (C.A. 2), certiorari denied, 397 U.S. 1006.

3. Petitioner Overton also argues that the trial court erred in empanelling an alternate juror after petitioner had been placed in jeopardy. However, a review of the relevant facts shows that this claim is without merit.

On April 6, 1972, twelve jurors and two alternates were selected and sworn. The following day, one of the jurors was excused with the consent of all parties and an alternate replaced her. The trial judge then summoned a new panel of six veniremen and a new alternate was selected. The defendants were given three additional peremptory challenges, which could be directed at any of the twelve regular jurors or either of the two alternates. All defendants declined to exercise these peremptory challenges and the court withdrew the additional challenges which had been given to to the government. The trial proceeded to verdict without further change in the jury composition and, prior to deliberations, the two alternates were dismissed. Since the challenged alternate never participated in the jury's deliberations no further review of petitioner's technical claim is warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSON,
Assistant Attorney General.

JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys.

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